

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CB RICHARD ELLIS INC,
Plaintiff,

-vs-

CHRISTOPHER K. O'HARA,
Defendant.

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: Civ. No. 3:99cv727(PCD)
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RULINGS ON PLAINTIFF'S MOTION FOR DEFAULT, PLAINTIFF'S MOTION
FOR CLARIFICATION, PLAINTIFF'S MOTION TO AMEND FIRST AMENDED
COMPLAINT, AND PLAINTIFF'S MOTION TO AMEND TRIAL
PREPARATION ORDER NOTICE

Pending before this court are plaintiff's motion for entry of default as to Christopher K. O'Hara, to dismiss, and to preclude evidence due to defendant's willful failure to comply with the court's trial preparation order ("TPO"), plaintiff's motion for clarification of order and/or to extend time to comply with the TPO, plaintiff's motion to amend its first amended complaint and plaintiff's motion to amend its TPO compliance. For the reasons set forth herein, the motion for default, to dismiss and to preclude evidence is **granted in part**, the motion for clarification or an extension of time is **denied as moot**, the motion to amend is **granted** and the motion to amend plaintiff's TPO compliance is **granted**.

I. BACKGROUND

On January 23, 2002, this Court issued its TPO. After a series of extensions, and defendant's intervening health issues requiring an eight-month continuation of trial, the TPO was reinstituted on March 3, 2003, requiring Part B compliance not later than April 18, 2003, and Part C compliance by May 2, 2003. On March 14, 2003, an order issued in response to an

exchange of letters by the parties debating defendant's ability to attend trial, identifying the earliest trial date as October 1, 2003.¹ On April 17, 2003, the day before Part B compliance was due, defendant moved for an extension of time, alleging that he misunderstood the March 14, 2003 order as extending the TPO deadlines and identifying delays in completing his TPO compliance attributable to plaintiff's allegedly obstructionist tactics in discovery. The extension was denied, finding the eleventh hour request unwelcome in light of defendant's failure to utilize FED. R. CIV. P. 37 procedures. Defendant alleges that the denial was received on April 24, 2003, and plaintiff was served with Part A and B compliance on April 28, 2003.

II MOTION FOR DEFAULT

Plaintiff moves for default, dismissal of counterclaims and/or to preclude defendant from adducing evidence due to defendant's failure to comply with the TPO deadlines. Defendant responds that the failure is attributable to a misunderstanding arising from the interaction of the January 23, 2003 and March 14, 2003 orders.

Defendant alleges that "[u]pon receipt and review of the Court order dated March 14, 2003, defense counsel believed that the defendant's trial preparation obligations had been continued until the trial was scheduled for sometime after October 1, 2003." He further alleges that "[a]lthough ultimately incorrect, this is not an entirely unreasonable interpretation of the Court's order." The concerns contemporaneous with the issuance of the order were defendant's physical ability to participate in trial. Prior to the present opposition brief,

¹ The order provided "[i]n light of the doctor's letter of March 10, 2003 detailing defendant's physical condition, trial is postponed until on or after October 1, 2003."

defendant never so much as suggested that his ability to complete TPO compliance would be impaired,² thereby substantiating his present interpretation of the order. It is therefore not apparent, given the concerns at the time specific to defendant's physical ability to participate in the trial, how defendant reasonably interpreted this one-sentence order as effectively staying all proceedings in the case. The last-minute request for an extension by defendant further belies any claim that defendant was himself convinced that the interpretation was reasonable.

Assuming, *arguendo*, that the order was not crystal clear as to its limited scope, it is not apparent how defendant can reasonably support his interpretation given the simple reference to “jury trial.” Any ambiguity as to the scope of the order should have prompted, at a minimum, a telephone call to chambers rather than a last minute request for an extension notably premised largely on plaintiff’s obstreperous conduct in discovery.

The trial preparation order constitutes a pretrial order. Failure to comply with a pretrial order subjects the violating party to the panoply of sanctions available under FED. R. CIV. P. 37(b)(2)(B), (C), (D), *see* FED. R. CIV. P. 16(f), which includes precluding a party from supporting or opposing claims or defenses, striking pleadings, entering a default judgment or dismissing the action. A default should enter only on “a showing of willfulness, bad faith or fault on the part of the defaulted party.” *Downs v. Westphal*, 78 F.3d 1252, 1257 (7th Cir. 1996).

² Defendant argues that TPO compliance was unwieldy given the separation between counsel and Mr. O’Hara while undergoing treatment. As defendant is quick to point out in opposing plaintiff’s motion for leave to amend the complaint, discovery had long since closed, thus presumably counsel had all discovery in his possession as necessary to comply with the TPO. Furthermore, to the extent counsel needed to confer with his client, this Court is aware of no prohibition on telephone calls to Mr. O’Hara during his treatment. As such, the argument is disingenuous.

“Dismissal . . . is an extreme sanction, to be imposed only in extreme circumstances.” *Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 734 (2d Cir. 1987). As a general matter, “[p]arties should not be denied relief solely because of a procedural error or unless clearly contumacious behavior is involved” CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 6A FEDERAL PRACTICE AND PROCEDURE § 1531 (2d ed. 1990).

Although this Court in no way condones defendant’s late filing and finds that defendant violated the schedule set forth in the TPO, it is not prepared to award as a sanction preclusion, default or dismissal as such would not be proportional to the ten-day delay. However, plaintiff shall be awarded monetary sanctions commensurate with time spent as a consequence of defendant’s delay. Plaintiff shall submit its application for attorneys’ fees with appropriate documentation not later than August 22, 2003. Defendant shall file any objection to such application not later than August 27, 2003.

III. MOTION FOR CLARIFICATION

Plaintiff moves for clarification and/or for extension of time to comply with the TPO. As plaintiff has since filed its TPO compliance, the motion is denied as moot.

IV. PLAINTIFF’S MOTION TO AMEND FIRST AMENDED COMPLAINT

Plaintiff moves for leave to amend its complaint. Defendant objects to the filing of the amended complaint, arguing that the amendment should be precluded because of plaintiff’s undue delay in filing the amendment two months after the close of discovery and after defendant expended considerable time complying with the TPO, bad faith in proposing the amendment purportedly simplifying issues for trial and prejudice resulting from revisiting discovery matters

and the TPO compliance.

“Leave to file an amended complaint ‘shall be freely given when justice so requires,’ FED. R. CIV. P. 15(a), and should not be denied unless there is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility.” *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001). Although defendant’s argument as to delay has some merit, the revisions do not create new causes of action or require further discovery. For example, plaintiff’s proposed amendment changes “CBRE requires that its brokers and salespersons be imbued with and follow the very highest moral, ethical and business standards” to “CBRE required that O’Hara follow the very highest moral, ethical and business standards.” Defendant objects to this allegation claiming he has evidence that other salespeople subject to the same agreement violated the business standards. As the substantive counts are largely unchanged, with the amendments limited primarily to factual allegations, it is not apparent how the amendment changes the position of the parties. The amended complaint appears to retract rather than expand the scope of the complaint, thus defendant’s dissatisfaction with his ability to discredit allegations does not constitute the sort of negative effect justifying a request for leave to amend the complaint.

Defendant further objects to the modification of the damages claim from “approximately \$350,000” to “in excess of \$350,000.” In so doing, defendant argues, “this amendment would permit [plaintiff] to attempt to recover some unstated amount of damages ‘in excess of \$350,000.’” As an initial matter, “approximately” may well be “in excess of” \$350,000, as both are indeterminate amounts. Moreover, as discovery has long-since closed, the parties

either possess or lack evidence of damages. Regardless of the arguable nuances between the current and proposed allegation, plaintiff must establish its entitlement to such damages. If plaintiff intends to carry its burden with evidence of damages, it likely has produced and will be limited to such evidence through the course of discovery. As such, the amendment would work no prejudice on defendant nor require further discovery. The Clerk shall docket the second amended complaint.

V. PLAINTIFF'S MOTION TO AMEND TRIAL PREPARATION ORDER NOTICE

Plaintiff moves to amend its TPO Section A compliance to add identified witnesses and exhibits. The motion is granted.

VI. SCHEDULING ORDER

In light of the foregoing, the parties shall be afforded the opportunity to amend their TPO compliance to reflect any adjustments necessitated by these rulings. In light of the October 1, 2003 deadline after which this case is deemed ready for trial, the following schedule shall apply to any adjustments made to the TPO compliance already filed:

Part A due: August 22, 2003;

Part B due: September 5, 2003;

Part C due: September 19, 2003.

VII. CONCLUSION

Plaintiff's motion for default (Doc. No. 93-1) is **denied**, plaintiff's motion to dismiss (Doc. No. 93-2) is **denied**, plaintiff's motion to preclude evidence due to defendant's willful failure to comply with the court's trial preparation order (Doc. No. 93-3) is **denied**, plaintiff's

motion for clarification of [63-1] order (Doc. No. 94-1) and motion to extend time to comply with the TPO (Doc. No. 94-2) are **denied as moot**, plaintiff's motion to amend the first amended complaint (Doc. No. 98-1) is **granted** and plaintiff's motion to amend its trial preparation order notice (Doc. No. 99-1) is **granted**.

SO ORDERED.

Dated at New Haven, Connecticut, August ____, 2003.

Peter C. Dorsey
United States District Judge